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IN THE

Supreme Court of the United States

October Term, 1987

JOE T. GONZALES,

Petitioner,

v.

SECRETARY OF THE AIR FORCE AND
DEPARTMENT OF THE AIR FORCE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 16, 1987

QUESTIONS PRESENTED

1. Whether the courts may dismiss the Title VII employment discrimination claims of federal employees against the federal government by interpreting this Court's decision in *Schiavone* v. *Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986), to preclude later amendment of the complaint to add the head of a federal agency as a defendant, where the individual claimant mistakenly named the agency instead of the head of the agency.

2. Whether the thirty-day filing provision of 42 U.S.C. § 2000e-16(c) is jurisdictional, thereby rendering courts powerless to consider equitable factors in applying the thirty-day filing period to an amendment adding the head of the agency as a defendant in a Title VII action against the federal government.

PARTIES TO THE PROCEEDING

The petitioner in this application for a writ of certiorari to review dismissal of his Title VII employment discrimination claim is Joe T. Gonzales. The respondents are the Secretary of the Air Force and the Department of the Air Force.

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SECRETARY OF THE AIR FORCE AND
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above proceedings on August 18, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 824 F.2d 392 (5th Cir. 1987) and is reprinted in the appendix hereto, p. 5A, *infra*. The opinion of the United States District Court for the Northern District of Texas is reported at 638 F. Supp. 1323 (N.D. Tex. 1986) and is reprinted in the appendix hereto, p. 18A, *infra*.

JURISDICTION

The decision of the Court of Appeals was entered on August 18, 1987. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rules 15(c) and 4(j) of the Federal Rules of Civil Procedure and Title VII of the Civil Rights Act of 1964, Section 717(c), as amended, 42 U.S.C. § 2000e-16(c) (1982). The statutes are reprinted in the appendix hereto pp. 2A-4A, *infra*.

STATEMENT OF THE CASE

The issues raised in this case are of great importance to federal employees seeking to enforce their civil rights under Title VII of the Civil Rights Act of 1964 ("Title VII"), Section 717(c), as amended, 42 U.S.C. § 2000e-16(c) (1982), against agencies of the federal government. The dismissal of petitioner's claims typifies the harsh results of the erroneous or unintended application of this Court's decision in *Schiavone* v. *Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986), and Rule 15(c) of the Federal Rules of Civil Procedure. That same misapplication of *Schiavone* has been used by numerous courts to preclude Title VII claimants from litigating their claims on the merits, because they made a trivial procedural mistake.

Each of these cases involves the application of Rule 15(c) to Title VII claims against the federal government. Each claimant exhausted his administrative remedies against the defendant agency in a protracted adversarial proceeding. In each case, the government agency had full knowledge of all aspects of the claims due to adversarial administrative proceedings that included investigations, findings, and the assistance of counsel. After exhausting all administrative remedies, each employee filed his action in federal court in a timely manner within the thirty-day filing period, but erroneously named the agency as the defendant. The federal employee then sought to amend his complaint to add the proper defendant, the head of the agency.

Applying this Court's decision in *Schiavone*, the courts below have dismissed these Title VII claims, concluding erroneously that *Schiavone* requires dismissal whenever a federal employee-claimant makes one technical mistake—he names the agency,

instead of its head, as the defendant in his federal action and fails to correct his mistake within the thirty-day filing period. As a result, in each instance, notice of and participation in the administrative litigation was not sufficient "notice of the action" to permit relation back of the amendment to the complaint under Rule 15(c). The results are the frustration of congressional policy and injustice to a large group of federal employees.

The facts of the petitioner's case are undisputed. In 1980, petitioner was employed by the United States Air Force ("Air Force") at Goodfellow Air Force Base in San Angelo, Texas. He applied for and was denied a promotion. Petitioner, a Mexican-American, claimed he was denied the promotion on the basis of race and national origin. On January 7, 1981, he filed a formal administrative claim against his employer, the Air Force, claiming discrimination under Title VII.

A. Administrative Proceeding

Federal employees are required to exhaust certain administrative remedies before filing suit in federal court. *Love* v. *Pullman Co.*, 404 U.S. 522, 523 (1972). Petitioner's administrative proceeding was conducted in accordance with 29 C.F.R. § 1613. This proceeding's history illustrates the administrative labyrinth facing all plaintiffs in Title VII cases against the federal government. During the four-year administrative process, petitioner was faced with a number of short limitations periods of fifteen, twenty, and thirty days, in which he was required to give notice, file complaints, and submit formal requests in order to enforce his claims against the Air Force. He satisfied each requirement in a timely manner. As the Court of Appeals observed, petitioner "diligently pursued his administrative remedies in accord with Department instructions and procedures." *Gonzales* v. *Secretary of the Air Force*, 824 F.2d 392, 393 (5th Cir. 1987).

Throughout the four-year proceeding, the Air Force—represented by legal counsel—was able to and did conduct a thorough investigation, interviewing all witnesses with first-hand knowledge and reviewing relevant documents. These

documents included employee records and evaluations, position descriptions, applications, resumes, and work force demographic studies. The Air Force participated in an adversarial hearing, in which it actively and vigorously defended against petitioner's claims. Thereafter, the Air Force prepared and submitted a post-hearing brief, and later submitted briefs upon appeal to the Equal Employment Opportunity Commission ("EEOC") in an action captioned *Gonzales* v. *Department of the Air Force*. The Air Force was thus thoroughly familiar with petitioner's claims and the underlying facts, and vigorously defended against those claims during four years of adversarial litigation.

B. Air Force Instructions Concerning The District Court Action

In mid-March 1985, petitioner received notice of the final, adverse EEOC decision in his administrative appeal against the Department of the Air Force. Notices from various Air Force representatives advised petitioner of his right to file a civil action. Petitioner, however, was never advised by the Air Force that he was required to file his district court action against the Secretary of the Air Force ("Secretary") in his official capacity, or that he could not proceed against the Air Force alone, as he had done throughout the four years of adversarial administrative proceedings.

C. Decision Of The District Court

On April 12, 1985, in accordance with the Air Force's instructions and within the thirty-day filing period of Section 717(c) of Title VII, 42 U.S.C. § 2000e-16(c) ("Section 2000e-16(c)"), petitioner filed a complaint in the United States District Court for the Northern District of Texas, alleging claims of employment discrimination under Title VII. The complaint named the same defendant against whom petitioner had been litigating for four years. The Air Force received a copy of the summons and complaint on or about April 30, 1985, and the petitioner served the United States Attorney on July 24, 1985, both within the 120-day

service requirement of Rule 4(j) of the Federal Rules of Civil Procedure.

D. Dismissal By The District Court

More than a year later, on April 16, 1986, the Air Force moved to dismiss petitioner's complaint for failure to state a claim. The Air Force argued that petitioner had failed to institute his action against the "proper party," the Secretary, within thirty days of petitioner's receipt of the final EEOC decision, as required under Section 2000e-16(c).

On May 16, 1986, the district court denied the Air Force's motion and granted leave to amend the complaint to add the Secretary as a defendant. The district court held that Section 2000e-16(c) was jurisdictional; but relying upon the liberal application of Rule 15(c) embraced by the Fifth Circuit, it held that petitioner had in fact complied with the jurisdictional requirements contained in Section 2000e-16(c). The district court noted that petitioner had satisfied the jurisdictional prerequisites by commencing his action against the Air Force within the thirty-day filing period and by serving the summons and complaint upon the Air Force within a reasonable time after the thirty-day period had run. On July 2, 1986, petitioner filed an amended complaint naming the Secretary as a defendant.

On June 18, 1986, this Court rendered its decision in *Schiavone* v. *Fortune*, 477 U.S. 21, 106 S. Ct. 2379 (1986). On July 17, 1986, the respondents moved for reconsideration based upon *Schiavone*. The district court then dismissed the action. *Gonzales* v. *Secretary of the Air Force*, 638 F. Supp. 1323, 1325 (N.D. Tex. 1986), *aff'd*, 824 F.2d 392 (5th Cir. 1987). The district court erroneously relied on *Schiavone* and held that "there [was] no proper notice to the [Air Force] that could be imputed to the Secretary of the Air Force," because petitioner did not serve the Air Force within the thirty-day period. *Id.* at 1325.

E. Decision Of The Court Of Appeals

On August 18, 1986, petitioner filed his notice of appeal of the district court's dismissal. On August 18, 1987, the Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of petitioner's claims. The Court of Appeals did not address petitioner's arguments that: 1) the congressional policy on which the remedial goals of Title VII are based requires liberal application of the thirty-day filing provision; 2) the Air Force misled petitioner concerning the filing requirements of his action in federal district court and thereby waived its right to assert the thirty-day filing provision under principles of equity; and 3) *Schiavone* should not be applied retroactively. 824 F.2d at 393-96.

Instead, the Court of Appeals dismissed petitioner's claim solely on the ground that *Schiavone* and Rule 15(c) require the Secretary to receive notice of the federal lawsuit within the thirty-day filing period. 824 F.2d at 394-96. The Court of Appeals found it irrelevant that the Air Force had full knowledge of petitioner's claim and the underlying facts as a result of four years of mandatory administrative proceedings. *Id.* at 396. The Court of Appeals held that the later amendment adding the Secretary did not relate back to the filing of the complaint under Rule 15(c) and affirmed the district court's dismissal of petitioner's claims for failure to sue the proper party. *Id.*

Judge John R. Brown dissented from the majority "with a good deal of vigor." 824 F.2d at 399-400. He noted that "[t]he majority's characterization of [Section] 2000e-16(c) and Rule 15(c) as traps to frustrate a citizen in his quest to vindicate his civil right[s] is contrary to the spirit of our civil rights laws and the aspirations of the drafters of the Federal Rules of Civil Procedure." *Id.* at 396.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The questions presented in this petition fall squarely within three of the categories of "special and important reasons" for granting certiorari. R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 194 (6th ed. 1986); Sup. Ct. R.

17.1. First, the proper application of *Schiavone* and Rule 15(c) is a federal question with recurring and systemic effect on the rights of Title VII claimants throughout the country. Second, a clear conflict between the Circuit Courts of Appeals requires immediate resolution by this Court to provide uniformity in the application of federal law. Finally, the decision of the court below is contrary to the decisions of this Court. This Court should exercise its supervisory power to issue a uniform rule and correct the existing confusion.

I

CERTIORARI SHOULD BE GRANTED TO REVIEW THE MISAPPLICATION OF *SCHIAVONE* AND RULE 15(C).

Schiavone has been applied by the lower courts in a manner which has consistently allowed agencies of the federal government to avoid review of Section 2000e-16(c) Title VII claims against the federal government on the basis of a single technicality—the individual claimant filed his action in a timely manner within the thirty-day filing period but mistakenly named the agency instead of the head of the agency as the defendant. None of these cases involves the adequacy of notice to the defendants—only the consequence of a pleading error.

Section 2000e-16(c) requires, *inter alia*, that the claimant file his employment discrimination action against an agency of the federal government within thirty days of the time he receives the final decision in his administrative appeal to the EEOC and that he name the head of the agency as a defendant. 42 U.S.C. § 2000e-16(c) (1982).

In many reported post-*Schiavone* Title VII cases, the claimant sought to amend his complaint, pursuant to Rule 15(c), to add the head of the agency as a defendant after the thirty-day filing period had run. Rule 15(c) permits relation back of an amendment changing a party where the claims of the amended complaint arose out of the conduct, transaction, or occurrence set forth in the original complaint and where, within the limitations

period, the party to be added by amendment: 1) "received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits" and 2) "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Fed. R. Civ. P. 15(c).

Courts in the Second, Third, Fifth, Ninth, and Tenth Circuits have applied *Schiavone* to preclude any later amendment adding the head of the agency as a defendant pursuant to Rule 15(c), despite the fact that in each case:

(1) The claimant filed the action in district court after being required to exhaust his administrative remedies in a full and often protracted adversarial administrative proceeding, in which the defendant agency was able to investigate the facts, preserve evidence, and actively litigate against the claims;

(2) The claimant filed the district court action in a timely manner within the thirty-day filing period;

(3) The claimant filed the district court action against his adversary in the administrative litigation—the agency;

(4) The claimant served a summons and complaint upon the defendant agency within the 120-day service period provided under Rule 4(j);

(5) The claimant concededly would have satisfied Rule 4(j) if he had named the head of the agency initially and served the summons and complaint after the thirty-day filing period had expired but before the 120-day service period had run; and

(6) The head of the agency and the agency are and were in fact the same party.

See, e.g., Williams v. *Army & Air Force Exchange Service*, 830 F.2d 27 (3d Cir. 1987); *Koucky* v. *Department of the Navy*, 820 F.2d 300, 302 (9th Cir. 1987); *Bell* v. *Veterans Administration Hospital*, 826 F.2d 357, 360 (5th Cir. 1987); *Gonzales* v. *Secretary of the Air Force*, 824 F.2d 392, 394-96 (5th Cir. 1987); *Blair* v. *United States Postal Service*, 657 F. Supp. 524,

526 n.2 (S.D. Tex. 1987); *Stewart* v. *United States Postal Service*, 649 F. Supp. 1531, 1534-36 (S.D.N.Y. 1986); *Johnson* v. *United States Postal Service* , 113 F.R.D. 73, 76-77 (D. Colo. 1986); *Jenkins* v. *United States Postal Service*, No. 86-2192, slip op. (E.D. La. December 1, 1986); *cf. Fallett* v. *United States Postal Service*, 644 F. Supp. 625, 628-29 (N.D. Tex. 1986) (construing claim under Section 501 of the Rehabilitation Act of 1973, applying Section 2000e-16(c) filing provision).

These cases involve a substantial number of claimants under Title VII who have had their claims dismissed based upon a mistaken application of *Schiavone* and Rule 15(c) in the Title VII context. Naming the agency instead of the head of the agency is a trivial mistake; actual notice to the head of the agency is not at issue. Under Title VII, each claimant files his district court action after fully litigating his identical claims against the agency in an administrative proceeding.

A. The Lower Courts, In Applying *Schiavone* To Title VII Cases, Have Not Followed Relevant Decisions Of This Court.

The decisions of courts below erroneously applying *Schiavone* conflict with other decisions of this Court construing Title VII claims. Their incorrect interpretation of *Schiavone* is contrary to decisions of this Court before and after *Schiavone* and has resulted in numerous dismissals based upon a rigid and unjust application of the Federal Rules of Civil Procedure.

As this Court noted in *Schiavone*, Congress intended that the Federal Rules of Civil Procedure be "construed so as to do substantial justice." 477 U.S. at ___ , 106 S. Ct. at 2383 (quoting Fed. R. Civ. P. 8(f)). The "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." *Id.* at ___ , 106 S. Ct. at 2383.

According to this Court, a "guiding principle for construing the provisions of Title VII" is that literal and technical readings of the Title VII filing provisions "would be 'particularly inappropriate in

a statutory scheme in which laymen,[1] unassisted by trained lawyers, initiate the process.'" *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (quoting *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972)).

The decisions cited at pp. 8-9, *supra*, frustrate the congressional intent in enacting Title VII and conflict with this Court's guidance in applying it. In *Brown* v. *General Services Administration*, 425 U.S. 820, 825, 827-29 (1976), this Court held that Congress enacted Section 2000e-16 "to create an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination," because it was concerned that aggrieved federal employees did not have access to the courts and were often left to overcome a United States government defense of sovereign immunity.

The provisions of Title VII are to be liberally construed. *See Zipes*, 455 U.S. at 397, 398; *Love*, 404 U.S. at 527. Liberal application of procedural rules is required in order "to protect equal opportunity among all employees and prospective employees." *Galvan* v. *Bexar County*, 785 F.2d 1298, 1306 (5th Cir. 1986) (construing Age Discrimination in Employment Act ("ADEA") claim) (quoting *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970)); *accord Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975). "It is . . . the duty of the courts to make sure that [Title VII] works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970). "[J]udges slight the legislature's central command if they fail to recall that Title VII was devised as a measure that would be kept accessible to individuals untrained in negotiating procedural labyrinths." *Loe* v. *Heckler*, 768 F.2d 409, 417 (D.C. Cir. 1985); *accord Zipes*, 455 U.S. at 397.

1. While, as it happens, this petitioner was represented by an attorney, the lower courts have applied *Schiavone* in *pro se* actions, using the same technical interpretation of that decision and Rule 15(c) to dismiss the Title VII claims of litigants unrepresented by attorneys. *E.g., Johnson*, 113 F.R.D. at 74; *Stewart*, 649 F. Supp. at 1535.

Fair application of *Schiavone* clearly permits the relation back of petitioner's amendment of his complaint to add the Secretary. In each of the cited post-*Schiavone* cases, individuals were deprived of their opportunity to litigate their claims on the merits before the district court because they each made one mistake—they named the agency, against whom they had litigated in the administrative proceeding, instead of the head of the agency. The result of such an application is unjust and frustrates the congressional policy of Title VII. Given the misapplication of *Schiavone* resulting in repeated dismissals of Title VII claims based upon the same technical pleading error, this Court should review the decision below.

B. The Application of *Schiavone* In Title VII Cases Against The Federal Government Is An Important Issue Which Has Never Been Addressed By This Court But Which Will Directly Affect Hundreds Of Individual Claimants.

In *Schiavone*, this Court held that a plaintiff must satisfy four requirements under Rule 15(c) to amend his complaint to name an additional defendant after the statute of limitations has run:

> (1) [T]he basic claim must have arisen out of the conduct set forth in the original pleading;
>
> (2) [T]he party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
>
> (3) [T]hat party must or should have known that, but for the mistake in identity, the action would have been brought against it; and
>
> (4) [T]he second and third requirements must have been fulfilled within the prescribed limitations period.

477 U.S. at ___ , 106 S. Ct. at 2384.

Each of the claimants in the post-*Schiavone* cases, and petitioner in particular, satisfied all of the *Schiavone* requirements.

First, the claims in each amended complaint arose out of the conduct set forth in the original pleading. In particular, as the

court below noted and all parties agreed, petitioner in this case satisfied this requirement. 824 F.2d at 395.

Second, because the agency in each case participated in an adversarial administrative litigation, with extensive discovery and the assistance of counsel, there was full knowledge of the particulars of the claimant's case. As a result, the head of the agency received such notice that he could not be prejudiced in maintaining his defense in the federal court action. It would be unfair to dismiss these claims where the head of the agency clearly had timely and adequate notice necessary to avoid prejudicing his defense of the merits of the suit.

In petitioner's case, all known witnesses have been interviewed, statements have been taken, there has been a full exchange of pertinent documents, the Secretary had full knowledge of petitioner's claims and legal theories, and the Secretary has been represented by counsel for years. The court below applied *Schiavone* mechanically and erroneously. The notice requirement of Rule 15(c) is designed to prevent prejudice to the litigant who has not had fair notice. The agency heads in these cited cases could not claim prejudice.

The purpose of the "notice" requirement of Rule 15(c) was fully satisfied, but the result of the lower court's misapplication of *Schiavone* was injustice. As the dissenting judge below noted, "Whether the Air Force or some functionary in the office of the Secretary is served, the same people at the Department of the Air Force will process the summons, the same Air Force representative will appear in court, and the same entity will shoulder the burden of loss if [petitioner] prevails." 824 F.2d at 399.

Third, because Title VII requires exhaustion of administrative remedies against the agency before an aggrieved federal employee can file an action against the head of the agency in federal court, it is clear that the head of each agency knew or should have known that, but for the mistake in identity, the claimant would have filed his action against the head of the agency, and not just against the agency itself.

Finally, the head of each agency received notice of the institution of the action within the limitations provision such that he will not be prejudiced in maintaining his defense on the merits. Within the thirty-day filing period, each agency was "put . . . on notice of adverse claims," so that the evidence was fresh, memories were clear, witnesses were identified, and testimony was preserved through the agency's participation in the administrative litigation. *Cf. Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983); *accord Burnett* v. *New York Central Ry.*, 380 U.S. 424, 428 (1965); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (construing policies underlying the application of statutes of limitations). The policy underlying the requirment of notice within the limitations provision was fully satisfied in each case.

Moreover, as the dissenting judge below noted, the requirement of notice of the institution of the lawsuit within the limitations provision is satisfied in an action against the federal government by "delivery or mailing of process to a United States Attorney." 824 F.2d at 399 (*quoting* Fed. R. Civ. P. 15(c)). Petitioner served the United States Attorney on June 24, 1985, 100 days after filing his complaint.

Under Rule 4(j), service upon the United States Attorney is proper if effected within 120 days after the claimant files his complaint. *Gonzales*, 824 F.2d at 399 (Brown, J., dissenting). "Service of Process on the United States Attorney [gives], pursuant to Rule 15(c), the proper federal government defendant notice of the action and of the mistaken naming of the wrong governmental defendant . . . ." *Cf. Paulk* v. *Department of the Air Force*, 44 Fair Empl. Prac. Cas. (BNA) 1473, 1476 (7th Cir. 1987) (allowing relation back under Rule 15(c) in a Section 2000e-16(c) Title VII action where the thirty-day period was extended by the filing of an *in forma pauperis* application and the United States Attorney was served after the initial thirty-day period had expired).

Petitioner satisfied each of the four requirements under *Schiavone*, and his later amendment adding the Secretary should

properly relate back to the filing of his complaint under Rule 15(c).

Schiavone should not be applied rigidly in the Title VII context. *Schiavone* involved a claim under a state libel statute preceded by no administrative proceeding, with no apparent notice whatsoever to the proper defendant before the filing provision expired. The statute of limitations in *Schiavone* was one year, not thirty days. The claim here is one established by explicit congressional action in favor of federal employees. Title VII claims against the federal government, unlike the claims of libel in *Schiavone*, require a lengthy administrative process before a claimant may sue in federal court. In enacting Title VII, Congress contemplated a continuity between the administrative process and the district court action. *See Loe* v. *Heckler*, 768 F.2d 409, 417 (D.C. Cir. 1985). Having benefitted from the opportunity to litigate against petitioner's claim for four years, and obviously having had adequate notice, respondents cannot claim the unfair surprise or prejudice that may be present in cases where no prior administrative litigation has occurred.

Respondents should not be able to deprive Title VII claimants of their right to have their claims heard on the merits in federal court because of a legal fiction that the Secretary of the Air Force and the Air Force are not the same legal entity. As the dissenting judge below observed: "While historically, legal fictions have been utilized to meet the needs of justice, *Ex parte Young*, 204 U. S. 123 (1908), legal fictions should never be utilized to frustrate everyday realities." 824 F.2d at 399. The Air Force litigated against petitioner's claims for four years, and the notice requirement of *Schiavone* has been satisfied.

Each of the requirements of *Schiavone* has been satisfied in this case. The Secretary cannot claim prejudice. This Court should not countenance the misapplication of *Schiavone*. This Court should grant certiorari in order to correct the pervasive and unjust consequences of the misapplication of *Schiavone* by courts below.

II.

CERTIORARI SHOULD BE GRANTED TO PROVIDE PROMPT REVIEW OF THE FAILURE OF THE COURT OF APPEALS TO ADDRESS THE PETITIONER'S EQUITABLE ARGUMENTS.

A. Review Is Warranted Because Of A Conflict Among Several Of The Circuit Courts of Appeals.

This Court should grant the writ of certiorari in order to resolve the conflict among the Circuit Courts of Appeals as to whether the thirty-day filing requirement of Section 2000e-16(c) is jurisdictional. If it is not jurisdictional, the courts will be permitted to consider equitable factors in applying the thirty-day filing requirement. The Court of Appeals for the Fifth Circuit did not even consider petitioner's claim that the district court erroneously failed to address equitable factors before dismissing petitioner's action. The district court had held that under Fifth Circuit decisions "Section 2000e-16(c) is jurisdictional"; that determination became law of the case. The district court was thereafter precluded from considering equitable factors before dismissing petitioner's claims. The Court of Appeals did not discuss or reject the district court's holding. Soon thereafter, however, it held in another case that the thirty-day filing requirement is jurisdictional. *Bell* v. *Veterans Administration Hospital*, 826 F.2d 357, 360-61 (5th Cir. 1987).

The Court of Appeals decision below that Section 2000e-16(c) is jurisdictional is in conflict with decisions in the Courts of Appeals for the District of Columbia, Third, Sixth, Tenth, and Eleventh Circuits, which have held that the thirty-day provision is not jurisdictional. *Williams* v. *Army & Air Force Exchange Service*, 830 F.2d 27 (3d Cir. 1987); *Ross* v. *U.S. Postal Service*, 814 F.2d 616, 617 (11th Cir. 1987); *Hornsby* v. *United States Postal Service*, 787 F.2d 87, 89 (3d Cir. 1986); *Martinez* v. *Orr*, 738 F.2d 1107, 1109-10 (10th Cir. 1984); *Miller* v. *Marsh*, 766 F.2d 490, 493 (11th Cir. 1985); *Milam* v. *United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982); *cf. Boddy* v. *Dean*, 821 F.2d 346, 350 (6th Cir. 1987) (involving filing provision for

bringing complaint to the attention of the EEO counselor in Title VII action against the federal government); *Saltz* v. *Lehman*, 672 F.2d 207, 208 (D.C. Cir. 1982) (involving EEOC filing provision in Title VII action against the federal government).[2]

The Courts of Appeals for the Fifth, Seventh, and Ninth Circuits have held that the limitations provision is jurisdictional. *Bell*, 826 F.2d at 360-61; *Paulk* v. *Department of the Air Force*, 44 Fair Empl. Prac. Cas. (BNA) 1473, 1475 (7th Cir. 1987) (*relying on Sims* v. *Heckler*, 725 F.2d 1143, 1145-46 (7th Cir. 1984)); *Cooper* v. *United States Postal Service*, 740 F.2d 714, 716 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083-84 (9th Cir. 1983); *Newbold* v. *United States Postal Service*, 614 F.2d 46, 47 (5th Cir.), *cert. denied*, 449 U.S. 878 (1980); *Eastland* v. *Tennessee Valley Authority*, 553 F.2d 364, 368 (5th Cir.), *cert. denied*, 434 U.S. 985 (1977).

Two justices of this Court have previously recognized the need to resolve the conflict. *Stuckett* v. *United States Postal Service*, 469 U.S. 898 (1984) (White, J., joined by Rehnquist, J., dissenting from denial of writ of certiorari); *Cooper* v. *United States Postal Service*, 471 U.S. 1022 (1985) (White, J., dissenting from denial of writ of certiorari).

The views of the District of Columbia, Third, Sixth, Tenth, and Eleventh Circuits are well illustrated by the opinion in *Milam* v. *United States Postal Service*, 674 F.2d 860 (11th Cir. 1982). The *Milam* court relied on this Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), which held that Title VII filing requirements are not jurisdictional prerequisites to bringing Title VII actions and, like statutes of limitations, are subject to waiver, estoppel, and equitable tolling. *Zipes*, 455 U.S. at 397-98. While *Zipes* construed an EEOC filing requirement in a Title VII action against a private employer, the court in

2. The Eighth Circuit position, as set forth in *Scott* v. *St. Paul Postal Service*, 720 F.2d 524, 524-25 (8th Cir. 1983), *cert. denied*, 465 U.S. 1083 (1984), is unclear. There the court dismissed for lack of subject matter jurisdiction, but reviewed equitable considerations in holding that equitable tolling was not appropriate under the facts of the case.

Milam held that the *Zipes* filing provision and Section 2000e-16(c) are analogous and that "[t]imely filing is not a prerequisite to federal jurisdiction." 674 F.2d at 862. Neither the Fifth nor the Seventh Circuit has taken *Zipes* into account. *See Bell*, 826 F.2d at 360-61 & n.3; *Paulk*, 44 Fair Empl. Prac. Cas. (BNA) at 1475.

The uneven application of Section 2000e-16(c) by lower courts is amply demonstrated in the cited cases. The divergent interpretations of the thirty-day filing requirement have produced grossly unequal results in the enforcement of Title VII claims against a single employer, the federal government. Those federal employees fortunate enough to have brought their actions in circuits where Section 2000e-16(c) is not considered to be jurisdictional are permitted to present equitable considerations. Federal employees who bring their Title VII claims in other circuits are not.

This Court should provide a uniform interpretation of the Section 2000e-16(c) filing requirement in order that all federal employees will be ensured equal access to the federal courts when asserting their Title VII claims against the federal government.

B. Review Is Warranted Because The District Court's Decision That Section 2000e-16(c) Is A Jurisdictional Prerequisite Is Contrary To Decisions Of This Court.

The district court's determination that the filing provision of Section 2000e-16(c) is jurisdictional and consequently precludes consideration of equitable factors is not only contrary to this Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), as discussed briefly above, but is also contrary to other post-*Zipes* decisions such as *Schiavone*, 477 U.S. at ___, 106 S. Ct. at 2379, and *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984).

In *Schiavone*, this Court recognized that equitable factors may be considered in applying Rule 15(c). It noted that the *Schiavone* district court, after weighing equitable considerations under the facts of that case, determined that the equities of that

particular case did not justify affording the plaintiff relief under Rule 15(c). 477 U.S. at ___ , 106 S. Ct. at 2382.

The district court ruling in this case that Section 2000e-16(c) is jurisdictional was based on the 1977 Fifth Circuit decision in *Eastland* v. *Tennessee Valley Authority*, 553 F.2d 364, 368 (5th Cir.), *cert. denied*, 434 U.S. 985 (1977). *Eastland*, however, was predicated upon a line of cases holding that the ninety-day filing requirement in private sector Title VII cases was a jurisdictional prerequisite. When those cases were overruled by this Court's decision in *Zipes*, 455 U.S. at 385, the conceptual underpinnings of *Eastland* were eroded. *Eastland* is no longer good law. *Milam* v. *United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982); *Ross* v. *U.S. Postal Service*, 814 F.2d 616, 616-17 (11th Cir. 1987); *see Antoine* v. *United States Postal Service*, 781 F.2d 433, 439 n.6 (5th Cir. 1986)(dicta). *But see Bell* v. *Veterans Administration Hospital*, 826 F.2d 357, 360-61 (5th Cir. 1987).

In *Zipes*, 455 U.S. at 393-98, this Court endorsed the application of equitable considerations in Title VII cases, holding that the ninety-day filing requirement in private sector Title VII cases, 42 U.S.C. § 2000e-5(d), now codified at 42 U.S.C. § 2000e-5(e), was not a jurisdictional prerequisite. This Court said that the courts are free to consider this filing requirement in light of equitable considerations such as waiver, estoppel, and tolling. *Id.* This Court noted that the "guiding principle for construing the provisions of Title VII"—liberal construction of filing and other provisions—must be applied:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

455 U.S. at 397, 398. The rationale in *Zipes* applies with equal force to Title VII cases filed against the federal government under Section 2000e-16(c).

In *Baldwin County*, this Court addressed a claimant's failure to comply with a ninety-day filing provision, 42 U.S.C. § 2000e-5(f)(1), for claims against private employers. 466 U.S. at 149. The Court considered equitable factors and the possibility of equitable tolling. *Id.* at 150-52. Although in *Baldwin County* the Court found no facts to support equitable tolling, its review of equitable considerations demonstrated that it did not consider the filing provision jurisdictional. *Id.*

This Court has acknowledged the congruence between Title VII claims filed against private employers and those filed against the federal government. This Court has held that the "principal goal" in enacting Section 2000e-16(c) was to "eradicate 'entrenched discrimination in Federal Service' by strengthening internal safeguards and by according '[a]ggrieved federal employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under Title VII.'" *Chandler* v. *Roudebush*, 425 U.S. 840, 841 & n.1 (1976) (citing S. Rep. No. 92-415, 92d Cong. at 16 (1971)) (citations omitted). Congress intended that the substantive rules governing actions by federal employees against the federal government under Title VII should be the same as rules applicable to Title VII actions against private employers. H.R. Rep. No. 1746, 92d Cong., 2d Sess. 103, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2157-60; *Martinez* v. *Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984).

Compliance with Title VII filing periods is not a jurisdictional prerequisite to filing a Title VII suit; rather, like statutes of limitations, the filing periods are subject to waiver, estoppel, and equitable tolling. *Zipes*, 455 U.S. at 398. Therefore, the Court of Appeals erred in failing to consider and thereby rejecting petitioner's claim that the thirty-day filing provision involved here is not jurisdictional and that consideration of equitable factors is permitted.

The conflict between the decision rendered below and the *Schiavone*, *Zipes*, and *Baldwin County* decisions should lead the Court to review the decision below to ensure uniformity with its prior decisions.

The question presented here—whether consideration of equitable factors is permitted—will determine in subsequent cases whether a Title VII claim will be resolved on the merits or disposed of summarily on a procedural technicality with harsh and unjust results. That determination is of crucial importance to the hundreds of plaintiffs who have Title VII claims pending in the federal courts against the federal government, and the many more who may seek to enforce their civil rights in the future. Given the current divergence in the application of Section 2000e-16(c) in the Circuit Courts of Appeals, this Court should address the issue to ensure equal application of Title VII to all federal employees.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Dated: November 16, 1987
New York, New York

Respectfully submitted,

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No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

JOE T. GONZALES,

Petitioner,

v.

SECRETARY OF THE AIR FORCE AND
DEPARTMENT OF THE AIR FORCE,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 16, 1987

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, § 717(c), AS AMENDED, 42 § 2000e-16(c)

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

RULE 15(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 15. Amended and Supplemental Pleadings

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

RULE 4(j) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process

(j) **Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Joe T. GONZALES, Plaintiff-Appellant,

v.

SECRETARY OF the AIR FORCE and
the Department of the Air Force,
Defendants-Appellees.

No. 86-1609.

United States Court of Appeals,
Fifth Circuit.

Aug. 18, 1987.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, REAVLEY and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this employment discrimination action, the appellant, Joe T. Gonzales, argues that the district court erred in dismissing his complaint for his failure to sue the proper party within the required thirty-day statutory filing period. Based on the Supreme Court's decision in *Schiavone* v. *Fortune*, --- U.S. ---, 106 S. Ct. 2379, 91 L.Ed.2d 18 (1986), the district court held that Gonzales's amendment to his complaint naming the Secretary of the Air Force (the "Secretary") as a defendant, the only proper party sued or served, did not relate back under Fed.R.Civ.P. 15(c) to the original date of the filing. We affirm.

I

In December 1980, the Department of the Air Force (the "Department") did not select Gonzales for a warehouse-foreman position at Goodfellow Air Force Base in Texas. Claiming discrimination on the basis of race and national origin, Gonzales filed a timely formal administrative claim on January 7, 1981. During the next four years, he diligently pursued his administrative remedies in accord with Department instructions and procedures. After exhausting his administrative remedies, Gonzales filed suit in the district court pursuant to Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, naming the Department as the sole defendant. Gonzales filed his federal court complaint against the Department within the thirty-day statutory filing period as required by 42 U.S.C. § 2000e-16(c).[1] He served process on the Department on April 30, 1985, which was after the thirty-day filing period had expired, and served the United States Attorney on July 24, 1985.

On April 30, 1986, the Department moved to dismiss Gonzales's complaint, arguing that Gonzales had not complied with 42 U.S.C. § 2000e-16(c) because he failed to sue the *Secretary* within thirty days of receiving notice of the final decision of the Equal Employment Opportunity Commission ("EEOC"). Gonzales requested and was granted leave to amend his complaint, adding the Secretary as a defendant. Based on precedent in this circuit that interpreted Fed.R.Civ.P. 15(c)[2] liberally, *Hendrix* v.

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1. Section 2000e-16(c) provides:

> Within thirty days of receipt of notice of final action taken by a department, agency or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C. § 2000e-16(c) (1982).

2. Rule 15(c) provides:

> **Rule 15. Amended and Supplemental Pleadings**
>
> (c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a

Memorial Hosp. of Galveston County, 776 F.2d 1255 (5th Cir.1985); *Kirk* v. *Cronvich*, 629 F.2d 404 (5th Cir.1980), the district court held that notwithstanding Gonzales's failure to sue and serve the Secretary within thirty days of receiving the EEOC's final decision, he could amend his complaint to add the Secretary as a defendant. Under *Hendrix*, the amendment would relate back "to the original filing date of the complaint even though it [took] a reasonable amount of time after the limitations period to serve process upon the original party defendant." *Hendrix*, 776 F.2d at 1257.

After the district court granted leave to amend the complaint, the Supreme Court rendered its decision in *Schiavone*, 106 S.Ct. 2379. The district court granted the defendants' motion to reconsider its previous order, and, based on *Schiavone*, granted the defendants' motion to dismiss Gonzales's complaint. *Gonzales* v. *Secretary of the Air Force*, 638 F.Supp. 1323 (N.D. Tex.1986). The court held that because Gonzales did not serve the Department within the required thirty-day statutory period, there was no proper notice to the Department that could be imputed to the Secretary. Because no notice was given before the time limitation had expired, Gonzales could not amend his complaint to sue the proper party, and his complaint was dismissed. *Id.* at 1325. Gonzales appealed.

II

The district court correctly held that this case is controlled by *Schiavone*. In *Schiavone*, the plaintiffs timely sued Fortune Magazine for libel within New Jersey's one-year statute of limitations. "Fortune," however, was only a trademark and the name

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mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

of an internal division of Time, Incorporated ("Time"). The plaintiffs then attempted to serve process on Time's registered agent in New Jersey. The agent refused service because Time was not a named defendant in the suit. After the statutory filing period had expired, the plaintiffs amended their respective complaints to add Time as a defendant, and subsequently served process on Time. The district court dismissed the complaint, holding that the amendment did not relate back to the date of the original filing under Rule 15(c) because Time did not receive notice of the institution of the libel actions "within the period provided by law for commencing the action against [it]." *Schiavone*, 106 S.Ct. at 2381-82.

The Supreme Court affirmed and set forth four factors upon which "relation back" of an amended pleading under Rule 15(c) depends:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id. at 2384. The Court clearly stated that all four factors must be satisfied before relation back will apply. *Id.*

Like the plaintiffs in *Schiavone*, Gonzales has satisfied the first factor; the problem in this case lies with his satisfaction of the remaining factors. Reviewing the record, we have determined that the following dates are critical in the disposition of this case: (1) Gonzales received notice of the final agency decision on March 15, 1985, and he filed suit against the Department on April 12, 1985, within the thirty-day statutory time period; (2) on April 30, 1985, Gonzales served process on the Department, which was after the thirty-day time period had expired; (3) Gonzales served the United States Attorney on July 24, 1985; (4) the

court permitted Gonzales to amend his complaint, adding the Secretary as a defendant, on May 21, 1986; and (5) Gonzales served the amended complaint on the Secretary on June 2, 1986.

The record thus shows that the means Gonzales used for notifying the defendants of his federal action was service of process on the Department, the United States Attorney, and the Secretary. As the above dates indicate, however, each party received this notice *after* expiration of the prescribed thirty-day limitations period of 42 U.S.C. § 2000e-16(c).

The question before us, therefore, is whether the amendment adding the Secretary, the only proper defendant in this case, can relate back under Rule 15(c) to the original filing of the complaint so as to make the complaint against the Secretary timely. According to *Schiavone*, we must determine (1) whether the Secretary had sufficient notice of Gonzales's federal lawsuit such that no prejudice will result to the Secretary in maintaining his defense; and (2) whether the Secretary knew or should have known that the action brought against the Department would have been brought against him but for Gonzales's mistake concerning the named defendant in his complaint. *Schiavone* further instructs us that these two considerations must have been satisfied within the thirty-day limitations period of 42 U.S.C. § 2000e-16(c).

The indisputable facts show that Gonzales gave notice to the Secretary of this Title VII action by serving process on the Secretary on June 2, 1986, more than one year after the thirty-day limitations period had expired. No colorable argument can be made that this belated notice satisfies the second and fourth factors of the *Schiavone* test. Furthermore, Gonzales's notice to the Department and the United States Attorney by service of process was also received *after* the prescribed limitations period. Having failed to notify the Department and the United States Attorney within the thirty-day period, Gonzales cannot argue, under *Schiavone's* third factor, that knowledge of his federal lawsuit is imputed to the Secretary. Because Gonzales failed to notify any party of this action within the statutory period, the

Secretary could not have known that an action would have been brought against him but for Gonzales's mistake in naming the proper defendant. Gonzales has failed to satisfy the second, third and fourth factors of the *Schiavone* test and we hold, therefore, that the amended complaint did not relate back under Rule 15(c) to the original date of the filing of the action.

Gonzales argues, however, that the Secretary had "both formal and informal notice of Mr. Gonzales's action through the Air Force's active involvement at every stage of the administrative process." Brief for Appellant at 22. According to Gonzales, because the Department and the Secretary had detailed knowledge of the more than four years of administrative litigation, the defendants were on notice that Gonzales would continue to seek relief in federal court. Although there is no dispute that Gonzales and the Department were involved in lengthy administrative battles for a number of years, the mere fact that administrative proceedings occurred cannot be construed as any kind of notice, whether "formal" or "informal,"[3] of a subsequent federal lawsuit.

Finally, we note that the procedural posture of this case is not dissimilar to that of *Schiavone*. The plaintiffs in *Schiavone* filed suit in a timely manner, as did Gonzales, but did not serve any party until after the one-year statute of limitations had expired. The Court stated:

> [N]otice to Time and the necessary knowledge did not come into being within the period provided by law for commencing the action against Time, as is so clearly required by Rule 15(c). That occurred only after the expiration of the applicable 1-year period. This is fatal, then, to petitioners' litigation.

Similarly, Gonzales did not serve any party within the thirty-day statutory time period. Just as the *Schiavone* plaintiffs' failure to provide notice to Time within the limitations period barred

3. Because Gonzales gave *no* notice to any party of his federal action within the statutory time period, we do not decide the issue he raised concerning whether relation back under Rule 15(c) requires formal notice, *i.e.*, service of process, or whether some kind of informal notice would be sufficient.

relation back of the amended complaint under Rule 15(c), Gonzales's failure to notify the Secretary properly also makes the relation back provision of Rule 15(c) inapplicable.[4]

III

In conclusion, Gonzales's failure to notify the Secretary "within the period provided for [sic] law for commencing the action against him" as required by Rule 15(c) precludes relation back of his amended complaint, naming the Secretary as defendant, to the date of the original pleading. The district court's dismissal of Gonzales's complaint is therefore

AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting.

The majority's characterization of § 2000e-16(c) and Rule 15(c) as traps to frustrate a citizen in his quest to vindicate his civil right is contrary to the spirit of our civil rights laws and the aspirations of the drafters of the Federal Rules of Civil Procedure.[1] Therefore, I must respectfully dissent.

The majority holds the United States Supreme Court's interpretation of Rule 15(c) in *Schiavone* v. *Fortune*, 477 U.S. ---,

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4. In our view, the principal error of the dissent is that it confuses *filing* with *notice*. We do not read the word "file" in 42 U.S.C. § 2000e-16(c) to mean "file and serve" within the thirty-day period prescribed by the statute. Filing means filing. Notice means notice. The dissent, however, reads the word "notice" in Rule 15(c) to be synonymous with the word "file," which, indeed, if read synonymously would be a legal fiction, and a proposition for which no authority is or can be cited. In this respect our holding is simple: the Secretary did not receive notice that a complaint had been filed against anyone until, at the very earliest, the complaint was served on the Department, some eighteen days after it was filed and some sixteen days after the statute of limitations had expired. There is, therefore, simply no way that Rule 15(c)(1) and (2) could have been satisfied within the thirty-day prescribed limitations period as required by *Schiavone*.

1. Rule 1 of the Federal Rules of Civil Procedure provides:

"[t]hey [the rules] shall be construed to secure the just, speedy and inexpensive determination of every action." While the majority's affirmance of the dismissal of Gonzales' claim is, without a doubt, speedy and inexpensive, it would be far from just.

106 S.Ct. 2379, 91 L.Ed.2d 18 (1986) mandates a dismissal of Gonzales' action. I do not find *Schiavone* either that controlling on these facts or that draconian in effect. A retelling of Gonzales' travels to this point in his appeal demonstrates how Gonzales has avoided the procedural road blocks to his substantive claim.

After a four-year administrative bout with the Air Force, during which Gonzales and his attorney crossed each procedural hurdle successfully, Gonzales finally exhausted all appeals through the EEOC. Gonzales came to the end of his administrative rope on March 15, 1985. According to the statute, he had "thirty days of receipt of notice of final action . . . [to] *file* a civil action . . . ." 42 U.S.C. § 2000e-16(c) (emphasis added).[2] The civil action was filed on April 12, 1985, within the thirty-day requirement of the statute.

The majority opinion reads the word "file" in the statute to mean "file and serve," and that this implied service "requirement" must also be done within the thirty-day period. Simply stated, this is not what the statute says. The word "file" means just that—file.[3] A suit is filed when the complaint, that is, the legal paper, is presented to and in the actual or constructive possession of the clerk of the court. *Compare Leggett* v. *Strickland*, 640 F.2d 774 (5th Cir.1981), *with Jones* v. *Forest Oil Co.*, 663 F.2d 556 (5th Cir. 1981) (applying Louisiana law, "suit is filed when it is timely placed in the hands of the clerk of a court of competent jurisdiction for filing").

This court has held that filing a lawsuit within the period prescribed by statute is sufficient without the further requirement of service of process. *See Caldwell* v. *Martin Marietta Corp.*,

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2. According to the statute, "the Secretary of the Air Force," not Gonzales' old adversary "the Department of the Air Force," is the proper defendant.

3. Other circuits have wrestled with the definition of the word "file" and have reached the same result. See *Rodgers* v. *Bowen*, 790 F.2d 1550, 1552 (11th Cir. 1986) ("We therefore hold that a complaint is 'filed' for statute of limitations purposes when it is 'in the actual or constructive possession of the clerk.'") (citations omitted). The Tenth Circuit took the straight-forward approach and cited the American Heritage Dictionary of the English Language in defining "file" as "entry on official record or to apply for . . . or, more simply 'to submit papers.'" *Paluso* v. *Mathews*, 573 F.2d 4, 9 (10th Cir. 1978) (citations omitted).

632 F.2d 1184, 1188 (5th Cir. 1980). It is beyond argument that Gonzales complied with § 2000e-16(c) and *filed* his suit within thirty days of the final disposition of his administrative complaint so that the District Court had subject matter jurisdiction of the claim under the statute. Since the thirty-day filing provision under § 2000e-16(c) was satisfied, there is no reason to enter the fray of whether the miniscule thirty-day provision is jurisdictional, or merely a statute of limitation which can be subject to equitable tolling.[4]

My strongest disagreement with the majority's opinion is their reliance on *Schiavone* and Rule 15(c) while utterly ignoring Rule 4(j). In *Schiavone*, a diversity case brought under New Jersey's libel statute, the New Jersey statute of limitations required that a libel action be commenced one year after publication of the alleged libel. The New Jersey statute reads: "every action at law for libel or slander must be *commenced* within one year after the publication of the alleged liable [sic] or slander." N.J.Stat.Ann. 2A:14E (West 1952). Under New Jersey law, the issuance of process and a bona fide attempt to serve process are essential to the institution of a suit, *Bittles* v. *West Ridgelawn Cemetery*, 155 A. 130 (N.J.Ch.1931), because the statute of limitations continues to run after a complaint is filed. *Zaccardi* v. *Becker*, 88 N.J. 245, 440 A.2d 1329 (1982).

In *Schiavone*, the plaintiff filed his complaint on May 9, 1982. The limitation period expired on May 19, 1982. Not until May 20, 1982, did plaintiff's counsel attempt to serve the defendants, and a proper complaint was not served until July 21, 1982.

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4. *Compare Newbold* v. *United States Postal Service*, 614 F.2d 46 (5th Cir.) (jurisdictional) *cert. denied*, 449 U.S. 878, 101 S.Ct. 225, 66 L.Ed.2d 101 (1980); *Eastland* v. *Tennessee Valley Authority*, 553 F.2d 364 (5th Cir.) (jurisdictional) *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977) *with Antoine* v. *United States Postal Service*, 781 F.2d 433 (5th Cir.1986) (nonjurisdictional; questioning *Eastland's* continued vitality). *Cf. Chappell* v. *Emco Machine Works Co.*, 601 F.2d 1295, 1300-02 (5th Cir. 1979) (90-day filing requirement in private sector cases jurisdictional); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 811 n. 9, 100 S.Ct. 2486, 2490 n. 9, 65 L.Ed.2d 532 (1980) (same); *see also, Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-94, 102 S.Ct. 1127, 1132-33, 71 L.Ed.2d 234 (1982) (filing timely charge under Title VII not a jurisdictional prerequisite to suit in federal court).

Therefore, "neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune [the improper party] that could be imputed to Time [the proper party]." *Schiavone*, 477 U.S. at ---, 106 S.Ct. at 2384, 91 L.Ed.2d at 27. In the instant case, however, by correctly reading Rule 15(c) in conjunction with Rule 4(j), a proper party did receive notice within the required time frame.

The distinction is simple. In *Schiavone*, the Supreme Court relied on the New Jersey statute that required *commencement* of a law suit within the limitations period. Since no one was served within the prescribed limitations period, the suit was not "commenced." Consequently, there was no party to relate back to. This is in sharp contrast to Gonzales' suit: the federal statute requires only that a suit be *filed* within a thirty-day period.

Thus, since the suit was filed within the thirty-day period, we next look to see if service was proper. Under F.R.Civ.P. 4(j),[5] a party has 120 days from the filing of his complaint to serve the summons upon the defendant. This time for service of process takes on great significance for Gonzales in two ways.

First, Gonzales served the Department of the Air Force 18 days after filing his suit, well within the 120 day requirement. At oral argument, counsel for the Air Force conceded that at the moment the Air Force received notice of the suit, the Secretary received notice of the suit. The majority opinion implies—if it does not necessarily hold—that the Secretary did not receive notice until Gonzales amended his complaint naming the Secretary personally over a year later on June 2, 1986.

I am not so audacious, *United States* v. *Holmes*, 822 F.2d 481 (5th Cir.1987) (Brown, J., dissenting), to challenge *Schiavone's*

5. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

F.R.Civ.P. 4(j).

holding that we are bound to use the four factors for "relation back" of an amended pleading under Rule 15(c). Rather, I find these factors are a help to Gonzales, not a hindrance.

> (1) The basic claim must have arisen out of the conduct set forth in the original pleading;
>
> (2) the party to be brought in must have received notice that it will not be prejudiced in maintaining its defense;
>
> (3) the party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
>
> (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone, 477 U.S. at ---, 106 S.Ct. at 2384, 91 L.Ed.2d at 27.

Both parties agree the first requirement is met. As for the second, the "Secretary" received notice 18 days after the suit was filed, well within the 120 days allowed by Rule 4(j).

It is important to remember that even if the Secretary had been the named party, he, personally, probably *never* would have received notice of Gonzales' routine Title VII claim. The Secretary, when sued solely in his official capacity, and the Air Force are functionally identical for purposes of this suit and this appeal. As far as Gonzales is concerned, they are one and the same. With all sides knowing this to be so, I am at a loss to know why I—and all other Judges—cannot "know" the same.

Whether the Air Force or some functionary in the office of the Secretary is served, the same people at the Department of the Air Force will process the summons, the same Air Force representative will appear in court, and the same entity will shoulder the burden of loss if Gonzales prevails. While historically, legal fictions have been utilized to meet the needs of justice, *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), legal fictions should never be utilized to frustrate everyday realities. This fiction should not unjustly penalize a loyal government employee whose only mistake in prosecuting his good faith claim was that he, or his lawyer, failed to understand that even though his adversary throughout four years of EEOC administrative

hearings had been "the Department," suddenly, with no explanation, his opponent was transformed into "the Secretary."

The Air Force representatives who received the first complaint naming "The Air Force" were, in all likelihood, the same people who received the amended complaint naming "The Secretary of the Air Force." I cannot believe that the law tolerates such an absurdity that the Secretary was "prejudiced" by this mistake.

As to the third requirement, the knowledge of the mistakenly named defendant, it is easily met. No identity of interest and shared knowledge can be posited that is any closer than that between the Secretary and his Department. One commentator has advanced a helpful rule in these cases: "When plaintiff names an incorrect party, the courts probably will apply something akin to a reasonable [person] test to determine whether the party 'should have known' he was the one intended to be sued."[6] Under such a rule, Gonzales' mistake should clearly not be fatal.

The fourth requirement wraps up the above-mentioned three as a neat package, since the other standards were met within the time period set out in § 2000e-16(c) and Rule 4(j).

Gonzales also served the United States Attorney 100 days after the suit. That takes on a great importance when considered in light of Federal Rule of Civil Procedure 15(c). Service on the United States Attorney satisfies the requirements that (i) the Secretary of the Air Force have notice of the institution of the suit and (ii) the party knew or should have known of a mistake in the identity of the proper party. "The delivery or mailing of process to a United States Attorney ... satisfies the requirement of clauses (1) and (2),[7] hereof with respect to the United States or any agency or officer thereof to be brought into action as the defendant." F.R.Civ.P. 15(c).

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6. 6 C. Wright & A. Miller, Federal Practice and Procedure § 1498 (Supp. 1986); *see also, Romain* v. *Shear*, 799 F.2d 1416, 1417-18 (9th Cir.1986) *cert. denied*, --- U.S. ---, 107 S.Ct. 2183, 95 L.Ed.2d 840 (1987); *Hymen* v. *Merits Systems Protection Board*, 799 F.2d 1421, 1422 (9th Cir.1986) *cert. denied*, --- U.S. ---, 107 S.Ct. 1900, 95 L.Ed.2d 506 (1987); *Jarrell* v. *United States Postal Service*, 753 F.2d 1088 (D.C. Cir.1985); *Cooper* v. *United States Postal Service*, 740 F.2d 714 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022, 105 S.Ct. 2034, 85 L.Ed.2d 316 (1985).

7. These correspond to *Schiavone* requirements (2) and (3).

Without reading Rule 15(c) to operate after the expiration of the applicable statute of limitations, it would become a dead letter. "The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice [the real adversary] in any way." *Schiavone*, 477 U.S. at ---, 106 S.Ct. at 2389, 91 L.Ed.2d at 33 (Stevens, J., dissenting). That purpose is defeated—and the statute becomes largely superfluous—if it is construed to require the correction to be made before the statute has run.

Looking at Rule 15(c) in this light, the majority clearly erred in requiring that this suit be filed and served within the thirty-day period for "relation back" of the amended complaint, and in ignoring the appropriateness of Rule 4(j) in this case. I therefore respectfully, but with a good deal of vigor, dissent.

Joe T. GONZALES, Plaintiff,

v.

The SECRETARY OF the AIR FORCE and the Department of the Air Force, Defendants.

Civ. A. No. CA-6-85-27.

United States District Court, N.D. Texas, San Angelo Division.

July 29, 1986.

ORDER

WOODWARD, Chief Judge.

This matter came before the court on the defendants' Motion To Reconsider The Court's Order Of May 21, 1986 Denying Defendant's Motion To Dismiss Or, In The Alternative, For Summary Judgment. The plaintiff has filed a reply brief.

A. History of The Case

Plaintiff filed this suit on April 12, 1985, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* Plaintiff named the Department of Air Force as defendant, and sought injunctive relief and compensatory relief for the defendant's alleged racial, religious, national origin, and sex discrimination. Plaintiff sued for himself and for others similarly situated.

On April 30, 1986, defendant moved to dismiss plaintiff's complaint. Defendant claimed that plaintiff's failure to sue the Secretary of the Air Force within thirty (30) days of receipt of a final decision from the Equal Employment Opportunity Commission under 42 U.S.C. § 2000e-16(c) required dismissal. In his response, plaintiff stated that he intended to pursue only his individual claim, and sought to amend his complaint to add the Secretary of the Air Force as a defendant.

On May 21, 1986, 110 F.R.D. 350, the court entered an order denying defendant's motion to dismiss, and granting plaintiff leave to amend his complaint. The court based its decision upon Federal Rule of Civil Procedure 15(c) and precedent in the Fifth Circuit. *Williams* v. *United States*, 405 F.2d 234 (5th Cir.1968); *Kirk* v. *Cronvich*, 629 F.2d 404 (5th Cir.1980); *Hendrix* v. *Memorial Hosp. of Galveston County*, 776 F.2d 1255 (5th Cir.1985). Although plaintiff did not sue and serve the proper party within the thirty-day time period of 42 U.S.C. § 2000e-16(c), the court permitted plaintiff to amend because of the Fifth Circuit's interpretation of Rule 15(c). At that time, the Fifth Circuit permitted an amendment to relate back "to the original filing date of the complaint even though it may take a reasonable amount of time after the limitations period to serve process upon the original party defendant." *Hendrix* v. *Memorial Hosp. of Galveston County*, 776 F.2d at 1257.

B. Defendants' Pending Motion

Because of the United States Supreme Court's recent decision in *Schiavone, et al.* v. *Fortune, AKA Time, Inc.*, --- U.S. ---, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), *aff'd*, 750 F.2d 15, the defendants now move this court to reconsider the May 21, 1986, order. Although *Schiavone* is a libel suit, the Supreme Court specifically addressed the requirements for an amendment to relate back to the original date of filing under Rule 15(c).

There, as in the case at bar, the petitioners had filed their complaints within the statutory period, but sued and served "Fortune" magazine, instead of the proper party, Time, Inc. Although petitioners later amended their complaints and effected proper service on Time, Inc., this was done *after* the statutory period. On defendant's motion to dismiss, the district court dismissed the complaints, finding that the amendments did not relate back "because it had not been shown that Time received notice of the institution of the suits within the period provided by law for commencing an action against it." *Id.* at ---, 106 S.Ct. at 2382. The Third Circuit affirmed the district court.

The Supreme Court affirmed the circuit court and found as follows:

> *Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permits imputation of notice to a subsequently named and sufficiently related party.* In this case, however, neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time.

Id. at ---, 106 S.Ct. at 2384 (emphasis added). Therefore, the Fifth Circuit's liberal application of Rule 15(c) is overruled.

Based upon the Supreme Court's decision in *Schiavone, et al.* v. *Fortune, AKA Time, Inc.*, the court grants defendants' motion to reconsider.

C. Application of *Schiavone* to the Plaintiff's Amended Complaint

The pleadings show that the plaintiff received notice of the EEOC's final decision in mid-March of 1985, and filed suit on April 12, 1985. It is uncontroverted that plaintiff filed his suit against the Department of the Air Force within the thirty-day requirement of 42 U.S.C. § 2000e-16(c). Plaintiff did not serve, however, the department until April 30, 1985, and did not serve the United States Attorney until July 24, 1985. Based on *Schiavone*, because plaintiff did not serve the Department of the Air Force within the required thirty-day statutory period, there is no proper notice to the department that could be imputed to the Secretary of the Air Force. *Id.* Therefore, plaintiff cannot amend his complaint, and the complaint must be dismissed because he failed to sue the proper party. Furthermore, plaintiff is barred from filing suit again because the statutory period for filing a complaint has expired.

Accordingly, the defendants' motion to dismiss is granted, and plaintiff's suit is dismissed with prejudice. Judgment will be entered accordingly.